NO. 91-885

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In the Supreme Court of the United States

OCTOBER TERM, 1991

STEVEN L. EASLEY
Plaintiff-Petitioner

versus

SOUTHERN SHIPBUILDING CORPORATION
Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was it proper for the Trial Court to grant Summary Judgment in favor of a defendant dismissing the plaintiff's claim to Jones Act Seaman status because the Trial Court found that he was an employee in an occupation specifically covered by the LHWCA?

2. Was it proper for the Trial Court to grant Summary Judgment in favor of defendant on plaintiff's claim for Jones Act Seaman status in a situation where plaintiff was the regular substitute deckhand aboard a salvage vessel?

3. Was it proper for the Trial Court to grant Summary Judgment in favor of defendant dismissing plaintiff's General Maritime Law claim when plaintiff was working as a deckhand on a salvage vessel at the time of his injury?

Respectfully submitted,

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4. John A. E. Davidson, Counsel for Applicants Law offices of John Davidson
5. Southern Shipbuilding Corporation, Respondent
6. David J. L'Hoste, Counsel for Respondent Gibbons & L'Hoste

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

STEVEN L. EASLEY
Plaintiff-Petitioner

versus

SOUTHERN SHIPBUILDING CORPORATION
Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

REFERENCE TO OPINIONS

Applicant seeks review of the following opinions:

1. Order entered October 17, 1991, granting defendant's Motion for Summary Judgment on the issue of Seaman's Status.

2. Order dated December 10, 1990, granting defendant's Motion to Dismiss or alternatively granting a Summary Judgment on the grounds that plaintiff's sole remedy was under the LHWCA.

3. Judgment dated December 12, 1990 dismissing plaintiff's claim with prejudice.

4. Opinion by the United States Court of Appeals, Fifth Circuit, dated July 30, 1991.

5. The August 26, 1991, denial of Petition for Rehearing and Suggestion of Re-Hearing en banc by the United States Court of Appeals, Fifth Circuit.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The judgment to be reviewed is an opinion by the United States Court of Appeals, Fifth Circuit, rendered July 30, 1991.

2. The United States Court of Appeals for the Fifth Circuit denied applicant's petition for re-hearing and suggestion for re-hearing on en banc on August 26, 1991.

3. This Court has jurisdiction pursuant to 28 U.S.C.A. 1254 and under Supreme Court Rule 10.

STATUTES INVOLVED

The following statutes are involved in this case:

1. The Jones Act, 46 U.S.C.A. 688 et seq (text in appendix)

2. The Longshoreman and Harbor Worker's Compensation Act, 33 U.S.C.A. 901 et seq (text in appendix)

CONCISE STATEMENT OF THE CASE

(1) Nature of the case and course of proceedings and dispisition below.

Plaintiff, Steven L. Easley, (hereinafter referred to as "Easley") has made claims under the Jones Act and the General Maritime Law against his employer, Southern Shipbuilding Corporation (hereinafter referred to as "Southern"). Southern is the owner and operator of the D/B SOUTHERN NO. 6, the salvage barge on which plaintiff was injured.

Easley instituted a negligence claim under the Jones Act, 46 USCA 688. Southern then filed a Motion for Summary Judgment claiming that Easley was not a seaman

but, instead, was covered by the Longshoremen and Harbor Workers Compensation Act, 33 USCA 901, et seq. The trial court granted the motion dismissing plaintiff's claim as a Jones Act seaman. Plaintiff then amended his claim to specify a claim against defendant under the General Maritime Law. Southern filed a Motion to Dismiss the plaintiff's remaining claims for failure to state a cause of action or, in the alternative, for a summary judgment as a matter of law. The Trial Court granted the defendant's motion, dismissing Easley's claim with prejudice. Plaintiff appealed the lower Court's rulings to the U. S. Fifth Circuit Court of Appeals which affirmed the Trial Court and denied Rehearing.

(2) Statement of Facts.

The D/B SOUTHERN NO. 6 is a salvage barge equipped with two large cranes and several air tuggers. It also has a regular crew. In addition to the D/B SOUTHERN NO. 6, the defendant owned and operated three other vessels, the M/T. F.N. CANULETTE (the tug which was used to move the D/B SOUTHERN NO. 6), the D/B SOUTHERN NO. 1 (a smaller crane barge), and an unnamed workboat.

Plaintiff had been employed by the defendant, Southern Shipbuilding Corporation, (hereinafter referred to as "Southern") for many years prior to the date of the accident made the basis of this claim. His job title was "mechanic". (Appendix, p. 7). The Trial Court found that Easley spent the majority of his time repairing railroad cranes, yard equipment, cutting grass, and in maintenance of land based cranes. (Apendix, p. 7). In the month of his accident, Easley worked one hundred fifty nine hours. Of that, he spent one hundred fifty one hours working on land and eight working on the D/B SOUTHERN NO. 6. He did

no longshoring or shipbuilding work. Easley testified that he was also the regular substitute deckhand aboard the D/B SOUTHERN NO. 6. On the date of the accident made the basis of this claim, one of the regular D/B SOUTHERN NO. 6 crewmembers was unavailable for work and was replaced by plaintiff. (Appendix, p 2). Easley was working as the deckhand aboard the D/B SOUTHERN NO. 6 at the time of his accident. His supervisor, Charles Earl Cunningham, testified to that fact.

On the date of the accident, the D/B SOUTHERN NO. 6 was engaged in salvage operations. It was raising a barge from the bottom of the Mississippi River. Easley was injured when working from a flatboat which was an appurtenance to the D/B SOUTHERN NO. 6, attempting to lower a sling and shackles to assist the diver in the salvage operation. When the A-frame crane operator of the D/B SOUTHERN NO. 6 shoved a group of shackles and their attached sling overboard, the sling or a tugger line attached to it struck Easley in the back, knocking him to the deck. The person who shoved the sling and shackles overboard, Bobby Moree, was a regular member of the crew and was second in command of the D/B SOUTHERN NO. 6 at the time of the accident, reporting only to Earl Cunningham. According to Cunningham, the man in charge, the accident was caused by Bobby Moree and a co-worker shoving the shackles and sling overboard without holding on to them. Cunningham testified that the plaintiff, Easley, did nothing wrong to cause this accident. The District Court found that "regular substitute status does not equal permanent assignment to a vessel for purposes of satisfying the *Barrett* requirements". (Appendix, p. 2) and dismissed the Jones Act Claim.

With respect to Easley's General Maritime Law claim, the Trial Court found that plaintiff spent his time

working on repairing land cranes and locomotive cranes, repairing yard equipment, cutting grass, working in the compressor room, maintaining the dry dock, and occasionally substituting as a deckhand. However, the Court further found Easley's maintenance and repair of machinery and equipment "provides support to the shipbuilders and repairers. Therefore the Court finds that the plaintiff is barred from suing his employer under Section 905(b) of The Act." (Appendix, p 7-8).

The U. S. Court of Appeals for the Fifth Circuit upheld the Trial Court, finding that Easley was an enumerated employee covered by the LHWCA and was therefore precluded from Jones Act and General Maritime Law claims against his employer.

BASIS OF FEDERAL JURISDICTION

The Trial Court had jurisdiction over this matter pursuant to the Jones Act 46 U.S.C.A. 688 et seq, the General Maritime Law, and possibly the LHWCA, 33 U.S.C.A. 901 et seq.

ARGUMENT

QUESTION NO. 1:

WAS IT PROPER FOR THE TRIAL COURT TO GRANT SUMMARY JUDGMENT IN FAVOR OF A DEFENDANT DISMISSING THE PLAINTIFF'S CLAIM TO JONES ACT SEAMAN STATUS BECAUSE THE TRIAL COURT FOUND THAT HE IS AN EMPLOYEE IN AN OCCUPATION SPECIFICALLY COVERED BY THE LHWCA?

The matter presently before the Court contains many of the same issues as have been raised before this

Honorable Court in *Southwest Marine Inc. v. Gizoni,* 111 S.Ct. 1071, 112 L. Ed. 2d 1176, 59 U.S.L.W. 3577 (US Feb. 25, 1991, no. 90-584). There, as here, the trial Court found that the plaintiff was not a "seaman" under the Jones Act, but was a harbor worker precluded from recovering under the Jones Act by the exclusive remedy provision of the LHWCA. The Ninth Circuit Court of Appeals reversed and remanded. This Honorable Court has granted Writs of Certiorari. In *Gizoni,* supra, the Ninth Circuit joined the Sixth Circuit in holding that any person whose work involves shiprepair is necessarily restricted to coverage under the LHWCA. Here, the Fifth Circuit specifically found that Easley cannot be a seaman because he is a member of an enumerated classification under the LHWCA. *Easley v. Southern Shipbuilding Corp.,* 936 F.2d 839 (5th Cir., 1991) at p. 845 in 7 (to be found at Appendix, p. 18). Easley submits that he is not a member of an enumerated classification and that this determination, of itself is one for a jury to make. Easley further submits that, even if he was a member of such a class of workers, he should still be allowed to present evidence of his seaman's status to a jury under *Gizoni,* supra.

QUESTION NO. 2:

WAS IT PROPER FOR THE TRIAL COURT TO GRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANT DISMISSING PLAINTIFF'S CLAIM FOR JONES ACT SEAMAN STATUS IN A SITUATION WHERE PLAINTIFF WAS THE REGULAR SUBSTITUTE DECKHAND ABOARD A SALVAGE VESSEL?

Easley, submits that as the regular substitute deckhand aboard the D/B SOUTHERN NO. 6 who was assigned to that vessel for the length of its one day voyage he was entitled to present his claim to Jones Act Seaman's status to a jury.

Salvage operations have long been governed by maritime law. The roots of our modern law of salvage can be traced to the ancient and medieval sea codes which were, in turn, adaptations of the salvage concepts developed in Roman law. In turn, there concepts were developed by the seafarers who inhabited the Greek Island of Rhodes, which was the dominant sea power in Europe nine hundred years before the birth of Christ. Baer, *Admiralty Law of the Supreme Court*, 3rd Edition, 1979, Section 20.3 at pages 576 - 77. The principles of salvage found in these old sea codes are recognized by all maritime nations. Baer, at page 579. The vessel upon which the plaintiff was injured on the date of his accidnet, the D/B SOUTHERN NO. 6, is owned by the plaintiff's employer, Southern Shipbuilding Corporation. The D/B SOUTHERN NO. 6 is used for salvage work. Salvage opearations constitute three to four per cent of Southern Shipbuilding Corporation's work. The D/B SOUTHERN NO. 6 has a regular crew.

Plaintiff submits that the Motion for Summary Judgment should have been denied because at the time of his accident, there is much support for the fact that he was, in fact, a seaman and therefore can not be covered by the Longshoremen and Harbor Workers' Compensation Act. The LHWCA describes the class of workers covered by this statute as follows:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including ship repairmen, shipbuilders, and shipriggers, but such term does not include .. a master or member of a crew of any vessel .."

By its terms, the LHWCA does not cover "a master

or member of a crew of any vessel". Easley was, in the words of his own boss on the date of the accident, a deckhand assigned to the D/B SOUTHERN NO. 6. He therefore can not be covered by the LHWCA.

There is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his workon the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or the accomplishment of its mission or to the operation or welfare of the vessel in terms of its maintenance during movement or during anchorage for future trips. *Offshore v. Robison*, 266 F.2d 769 (5th Cir., 1959). The status determination as a whole is an inherently factual question and as cases since *Robison* make clear, it is generally a question for the fact finder. Cases also make clear, however, that status may be determined by summary judgment in the appropriate situation. That situation exists where facts establish beyond question, as a matter of law, the lack of seaman status. A Court may, in the proper case, hold that there is no reasonable evidentiary basis to support a jury finding that the injured person is a seaman. *Barrett v. Chevron U.S.A., Inc.*, 781 F. 2d 1067 (5th Cir., 1986). However, "if reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew' it is a question for the jury". *McDermott Int'l, Inc. v. Wilander*, 498 U.S.1, 111 S. Ct. 807 112 L. Ed 2d 866 (1991) quoting *Anderson v. Liberty* 477 U.S. 242, 250 - 251 (1986).

Here, there is a reasonable evidentiary basis for a jury to determine that plaintiff was a seaman. Defendant

would have the Fifth Circuit's *Barrett* test apply to this situation to determine that, because Easley only spent about eleven per cent of his time in the year of his accident aboard his employer's vessels, with the balance of his time working on land, that he is necessarily a longshoreman and not a seaman.

> 'We believe the better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule test explains our case law, and is consistent with the pre-Jones Act interpretation of "seaman' and Congress' land-based/sea-based distinction. All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." (*Wilander,* Supra at p 10).

As stated above, plaintiff submits that a mechanical application of *Barrett,* supra, is inapplicable in the type of fact situation presented by this case. Plaintiff had two jobs. Had he been injured cutting grass on land or repairing a land based crane, his remedies would be determined by land based law. However, Easley was not injured on land. He was injured while serving as a deckhand aboard a salvage vessel. He was injured as a result of the negligence of the regular crew of that vessel. As the regular substitute deckhand, it is submitted that he should not be precluded from asserting a Jones Act claim.

Plaintiff alternatively submits that the defendant's Motion for Summary Judgment on the issue of seaman status should have been denied not only as a matter of law but because there were issues of material fact concerning the seaman status question which were seriously

contested. The defendant's own employees even contradicted one another.

QUESTION NO. 3:

WAS IT PROPER FOR THE TRIAL COURT TO GRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANT DISMISSING PLAINTIFF'S GENERAL MARITIME LAW CLAIM WHEN PLAINTIFF WAS WORKING AS A DECKHAND ON A SALVAGE VESSEL AT THE TIME OF HIS INJURY?

Plaintiff submits that he still may maintain a claim under the Generai Maritime Law against his employer pursuant to *Thibodaux v. Atlantic Richfield Co.*, 508 F.2d 841 (5th Cir., 1978) and subsequent cases. Van Thibodaux was an amphibious oil field construction worker assigned to perform maintenance work on piping and flow lines owned by defendant. While being transported through navigable waters to his job site, the vessel in which he was riding sank and Mr. Thibodaux drowned. Plaintiffs also brought claims against their deceased's employer under the Jones Act. The trial court held on summary judgment that the plaintiff was not a seaman, and that he was not engaged in 'maritime employment' and therefore had no 905(b) claim against either his employer or ARCO. The Jones Act claim then became moot. The Appeals Court upheld the trial court's holding that plaintiff's decedent failed to meet the "maritime employment" requirement of the LHWCA, but overturned trial court's ruling that ARCO was protected by the prohibitions against suit in the Louisiana Workers Compensation Act and held that he may maintain a General Maritime Law claim versus his employer, despite the fact that he was not a "seaman".

An employee falls within ambit of the LHWCA only

if he can satisfy the dual tests of "situs" and "status" set forth in the act. *Northeast Marine Terminal Co. v. Caputo* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2d 320 (1977). The act provides that:

> "Compensation shall be payable ... in respect of disability or death of an employee, but only if the disability or death results in an injury occurring upon the navigable waters of the United States."

This is the "situs" test referred to immediately hereinabove. Since Easley was injured aboard a barge in the Mississippi River, it is admitted that he meets the "situs" test.

The act further provides:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a shiprepairer, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload any small vessel under eighteen tons net." 33 U.S.C.A. Section (1902).

This is the 'status' test. It is submitted that Easley can not meet this test. In his deposition, the Vice President of the defendant corporation, Earl Cunningham, admitted that plaintiff was a deckhand serving aboard the D/B SOUTHERN NO. 6 at the time of the accident made the basis of this claim. The trial court has ruled that, because Easley did not spend enough of his time working aboard the D/B SOUTHERN NO. 6, he did not have the per-

manency of assignment required of a Jones Act seaman. (Appendix, p. 3). Easley has addressed this issue above. He, nevertheless, *was* a deckhand on the date of his accident. At other times, he was a mechanic, predominantly working on land. The trial court found that Easley spent the vast majority of his time repairing railroad cranes, yard equipment, and in maintenance of land based cranes. (Appendix p. 7). In fact, that is what he did on the day before his accident. In *Thibodaux v ARCO,* supra, the Fifth Circuit looked to this Court's decision in *Northeast Marine Terminal Co. v. Caputo,* supra. There, the Court stated that:

> "When Congress said it wanted to cover 'longshoremen', it had in mind those persons whose employment is such that they spend at least some of their time in indisputably longshoring operations". ID at page 273, 97 S.Ct. at page 2362.

In the matter presently before the Court, Mr. Easley spent no time "indisputable longshoring, shipbuilding, shiprepairing, or shipbreaking." He spent some of his time doing substitute seaman's work, working on one of two derrick barges, a work boat, or a tug. The vast majority of his time was spent cutting the grass, repairing a locomotive, maintaining a land based crane, and working in the compressor room.

Plaintiff's claim is similar to that asserted in *King v. Universal Electric Construction,* 799 F.2d 1073 (5th Cir., 1986). There, a person who usually worked as an electrical lineman, drowned on the only day in three years that he worked on a boat. His employer hired the boat to assist to string electrical lines across a body of water. The Fifth Circuit Court of Appeals reversed the trial Court's dismissal

of the widow's General Maritime Law claim against her deceased husband's employer. Similarly, Easley, who worked for a shipbuilding company that had other interests such as salvage and various land based activities, primarily repaired locomotives, maintained land based cranes, worked in a compressor room, and worked in a shop repairing equipment belonging to his employer. Then, at his employer's convenience, he was assigned to work on a vessel. When he is doing this, he is doing work of a maritime nature which is covered by the General Maritime Law. Although the trial court has ruled that Easley did not have such a permanent connection with the vessel as to qualify him for Jones Act status, he must not be deprived of his General Maritime Law remedies against the vessel owner. As stated in *Thibodaux*, supra, if Easley is, in fact, covered by Louisiana State Worker's Compensation statues, his employer, as vessel owner, is not protected by the exclusivity provisions of that statute.

With respect to the General Maritime Law claim asserted by Easley, the Trial Court found that plaintiff's assertion that he was not engaged in ship repair or ship building work was correct. However, the Court further found that his activities did "directly involve plaintiff in such work" under *Alabama Dry Dock and Shipbuilding Co. v. Kiness*, 554 F.2d 176 (5th Cir. 1977)". Easley submits that this finding is not supported by this evidence. Plaintiff fails to see how cutting the grass or repairing the locomotive crane directly involves him in shipbuilding or shiprepairing work. Plaintiff submits that he is no more a shipbuilder or a shiprepairer as a secretary in the office located at Southern Shipbuilding Corporation.

CONCLUSION

1. The fact that Easley may have been a member of an enumerated classification under the LHWCA does not preclude him from qualifying as a seaman under this Jones Act.

2. A regular substitute deckhand aboard a salvage vessel may qualify as a Jones Act seaman.

3. A person who is injured while working as a deckhand on a salvage vessel may make a General Maritime Law claim against his employer, the vessel owner.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to all counsel of record by placing a copy of same in the United States mail, postage prepaid, addressed to the offices of said attorney(s) this 23rd day of November, 1991.

_____

George W. Byrne, Jr.

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
OCT 1 1990

STEVEN L. EASLEY	Civil Action
VERSUS	No. 90-517
SOUTHERN SHIPBUILDING CORP.	Section "I" (3)

ORDER AND REASONS

Before the court is the defendant's motion for summary judgment on the issue of seaman status. After reviewing the motion, memoranda of counsel, the record, and the law, the court grants the motion for the reasons set forth below.

On May 30, 1989, Steven Easley was assisting in a salvage operation in the Mississippi River when he was struck in the back by a "tag line" or "tugger" cable. Mr. Easley has brought suit, alleging Jones Act negligence, seeking damages for the injuries he received in the accident. The plaintiff maintains that he is a seaman, entitled to recovery under the Jones Act. The defendant claims that the plaintiff is not a seaman but is a harbor worker, entitled to compensation under the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. section 901.

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On the day of the accident, Mr. Easley was working on board the D/B SOUTHERN NO. 6, replacing a seaman who was unavailable for work. However, Mr. Easley's regular job with Southern Shipbuilding was as a mechanic in their shipyard. In order to prove that he is a seaman, entitled to compensation under the Jones Act, the plaintiff must show that: (1) he was permanently assigned to a vessel or performed a substantial part of his work on a vessel; and (2) the capacty in which the plaintiff performed contributed to the function of the vessel, its mission, its operation, or its welfare. *Barrett v. Chevron U.S.A., Inc.*, 782 F.2d 1067 (5th Cir. 1986?).

In the proper case a court may find that as a question of law, a plaintiff does not have seaman status under the Jones Act. *Beard v. Shell Oil Co.*, 606 F.2d 515, 517 (5th Cir. 1979). To prevail on a summary judgment motion, the moving party bears the initial burden of proving that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

For purposes of a summary judgment motion, the plaintiff's assertions will be considered correct. The plaintiff urges the court to consider that he was the regular substitute deckhand assigned to the D/B SOUTHERN NO. 6. The court prefers to look at the nature of the work actually done by the plaintiff and not his job titles. *See Gizoni v. Southwest Marine Inc.*, 909 F.2d 385 (9th Cir. 1990). Regular substitute status does not equal permanent assignment to a vessel for purposes of satisfying the *Barrett* requirements.

The issue that must be resolved by the court is whether the plaintiff satisfies the *Barrett* requirement that a seaman spend a substantial part of his work on a vessel. The Fifth Circuit has stated that to prove that the plaintiff

did substantial work on a vessel, he must show that he "performed a significant part of his work aboard the vessel with at least some degree of regularity and continuity." *Barrett*, 781 F.2d at 1074 (quoting *Barrios v. Engine & Gas Compressor Servs., Inc.*, 669 F.2d 350, 353 (5th Cir. 1982); *see also Dove v. Belcher*, 686 F.2d 329, 333 (5th Cir. 1982). The plaintiff here asserts that he worked 11.5% of the time on a vessel between January 1989 to May 1989. The other evidence provided to the court indicates that the percentage of his time spent on a vessel over the past few years was even lower. Accepting the plaintiff's figures as true, the court still finds that the plaintiff could not reasonably be found a seaman.

The plaintiff's assignment to the vessel was not a "regular and continuous" change in his normal function as a machinist in the shipyard. *Id.* at 1075 (quoting *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 n.6 (5th Cir. 1980)). Rather, the plaintiff's assignment to the vessel was intermittent and transitory while his permanent job assignment remained land-based. Because the evidence taken in the light most favorable to the plaintiff can lead only to the conclusion that the plaintiff was not a seaman, granting summary judgment in favor of the defendant is proper. *Id.* at 1074.

Accordingly,

IT IS ORDERED that the defendant's motion declaring the plaintiff not to be a seaman is GRANTED and the hearing scheduled for October 12, 1990 is CANCELLED.

New Orleans, Louisiana this 17 day of October, 1990.

s/s Henry A. Mentz, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
DEC 11 '90

STEVEN L. EASLEY	CIVIL ACTION
VERSUS	NO. 90-0517
SOUTHERN SHIPBUILDING CORP.	SECTION "I" (3)

ORDER AND REASONS

Before the court is a motion to amend to clarify his general maritime law claim filed by the plaintiff, Steven L. Easley. Also before the court is a motion filed by the defendant seeking the court either to dismiss or alternatively, to grant a summary judgment on the grounds that the plaintiff's sole remedy is under the Longshore and Harbor Workers Compensation Act. After reviewing the motions, memoranda of counsel, the record, and the law, the court denies the motion to amend and grants the motion for summary judgment for the reasons given below.

Under section 905(b) of the Longshore and Harbor Workers Compensation Act (the Act), 33 U.S.C. sections 901-950, a person injured by the negligence of a vessel is allowed a remedy against the vessel as a third party. However, if the person was employed as a shipbuilder, ship reparier, or ship breaker, he cannot maintain an action

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against the vessel if his employer was the owner of the vessel. *Id.* section 905(b).

At the time of his accident, Steven L. Easley (Easley) was an employee of Southern Shipbuild' ıg Corp. (Southern). Southern operates a shipyard in ' ıdell, Louisiana and its business is ship repair and construction. Easley was employed as a machinist/mechanic. The defendant claims that Easley's job was to help fabricate metal parts and components for incorporation into vessels that Southern was building or repairing, and to maintain and repair machinery in the shipyard and on vessels. The plaintiff disputes that he was engaged in any ship repair or shipbuilding work; he claims that he spent his time working on or repairing land cranes and locomotive cranes, repairing yard equipment, cutting grass, working in the compressor room, maintaining the drydock, and occasionally substituting as a deckhand.

After reviewing the time sheets attached to the plaintiff's motion to amend, the court finds that the plaintiff's description of his activities is correct. However, in order to be covered by the JAct, a plaintiff need not be a ship builder or ship repairer but need only be "directly involved" in such work. *Alabama Dry Dock & Shipbuilding Co. v. Kininess,* 554 F.2d 176, 178 (5th Cir. 1977) (quoting *Jacksonville Shipyards v. Perdue,* 539 F.2d 533, 540 (5th Cir. 1976)).

In *Alabama Dry Dock*, the plaintiff was injured when he fell from an elevated hopper while sandblasting a crane. 554 F.2d at 177. The Fifth Circuit held that the plaintiff was "directly involved" in shipbuilding activities because the crane he was sandblasting, once assembled, would be used in hauling ship parts to the ship. *Id.* at 178. The plaintiff here is in an analogous position: Although he

is not repairing or building ships, his maintenance and repair of machinery and equipment provides support to the shipbuilders and repairers. Therefore, the court finds that the plaintiff is barred from suing his employer under section 905(b) of the Act.

Furthermore, a person covered by the Act has no general maritime claim for unseaworthiness. *See Scindia Steam Nav. Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981); T. Schoenbaum, Admiralty and Maritime Law, § 6-10 (1987). Employers of shipbuilders/ship repairers are exclusively liable for compensation under the Act; they are immune from other liability. T. Schoenbaum, *Admiralty and Maritime Law*,§ 6-10. Therefore, the plaintiff's claim for general maritime law damages cannot be maintained.

Accordingly,

IT IS ORDERED that the plaintiff's motion to amend is DENIED.

IT IS FURTHER ORDERED that the defendent's motion to dismiss or alternatively, for summary judgment be GRANTED in the alternative, and a judgment be entered dismissing the plaintiff's claims with prejudice, each side to bear his own costs. The hearing scheduled for DECEMBER 5, 1990 was CANCELLED.

New Orleans, Louisiana this 10 day of December, 1990.

/s/ Henry A. Mentz, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
DEC 13 '90

STEVEN L. EASLEY	CIVIL ACTION
VERSUS	NO. 90-517
SOUTHERN SHIPBUILDING CORPORATION	SECTION I

J U D G M E N T

Considering the Court's Order and Reasons entered herein on December 11, 1990.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Southern Shipbuilding Corporation, and against plaintiff, Steven L. Easley, dismissing said plaintiff's complaint with prejudice. Each paraty is to bear its own costs.

New Orleans, Louisiana, this 12th day of December, 1990.

/s/ Henry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY DEC 13 1990

APPENDIX D

Steven L. EASLEY,
Plaintiff-Appellant,

v.

SOUTHERN SHIPBUILDING CORPORATION,
Defendant-Appellee.

No. 91-3021

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

July 30, 1991.

Shipyard employee brought action against shipyard under Jones Act, general maritime law, and negligence provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA). The United States District Court for the Eastern District of Louisiana, Henry A. Mentz, Jr., Jl, granted shipyards' motions for summary judgment and motion to dismiss, and employee appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) employee was "ship repairman" who could recover benefits under LHWCA but who could not maintain negligence action, and (2) as covered employee under LHWCA, employee could not maintain unseaworthiness claim under general maritime law.

Affirmed.

Harold M. Wheelahan, III, New Orleans, La., John A.E. Davidson, Metairie, La., for plaintiff-appellant.

David J. L'Hoste, Russel B. Ramsey, Gibbens & L'Hoste, New Orleans, La., for defendant-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JOHNSON, SMITH, and WIENER Circuit Judges.

WIENER, Circuit Judge:

Plaintiff-Appellant Steven L. Easley appeals from the district court's grant of motions for summary judgment and a motion to dismiss filed by the Defendant-Appellee Southern Shipbuilding Corporation (Southern), on the question of Easley's status as a ship repairer/longshoreman or as a seaman. Finding that the district court properly granted summary judgment and dismissed the plaintiff's claim, we affirm.

I.

FACTS

Southern is a shipyard in Slidell, Louisiana. In addition to the repair and construction of vessels, Southern performs salvage operations. At the time of his injury Easley had been employed by Southern for approximately twenty years. For about two and one half years prior to his injury Easley worked as a mechanic.[1] His duties included repair-

[1] Prior to his current job assignment, Easley had worked for Southern for years as a deckhand assigned to one or another of the vessels used

ing land cranes, locomotive cranes, and yard equipment, cutting grass, working in the compressor room, and maintaining Southern's dry dock. In addition to these jobs, Easley occasionally worked as a substitute deckhand aboard the D/B SOUTHERN NO. 6 (the NO. 6), a derrick barge owned by Southern and often used in salvage operations. Easley was injured in May of 1989 while substituting on the NO. 6 for a regular crewman on a one day salvage job in the Mississippi River.

Easley filed suit against Southern, alleging that he was a seaman entitled to coverage under the Jones Act, 46 U.S.C.App. § 688, and that he was injured through Southern's negligence. He also included a claim of unseaworthiness under the general maritime law. Southern filed a motion for summary judgment on the issue of Easley's seaman status, which motion was granted by the district court. The court reasoned that because Easley did not perform a substantial part of his work on a vessel, he was not eligible for seaman status. Easley moved to amend his complaint to clarify his general maritime law claim and to add a negligence action under § 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA). Southern filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6), or in the alternative for summary judgment, claiming that Easley's exclusive remedy is pro-

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Footnote 1 continued.

by Southern in its shipbuilding and salvage operations. Because he desired more family time, early in 1987 Easley asked to be reassigned to land duties. He was made a mechanic, but he agreed to fill in as a deckhand at his employer's convenience. His supervisor recollects that only once during Easley's tenure as a mechanic had he assisted in a salvage operation aboard the NO. 6. Although Easley asserts that he spent as much as eleven per cent of his time during the four months before his injury "aboard his employer's vessels," he does not specify whether he spent that time as mechanic or as deckhand.

vided by the LHWCA, but that he was ineligible to file a negligence action under LHWCA § 5(b) because he was a ship repairer or shipbuilder, two classes of employee precluded from proceeding under that section of the Act. The district court granted Southern's motion[2] and denied Easley's motion to amend his complaint. The court reviewed Easley's time sheets, and found that (1) Easley was a ship repairer, a class of workers enumerated within the LHWCA, (2) the LHWCA was his exclusive remedy, (3) as a covered employee under the LHWCA, Easley had no general maritime claim for unseaworthiness, and (4) that as a ship repairer he was excepted from that class of workers who may maintain a negligence action under LHWCA § 5(b) in addition to his claim for compensation. Easley timely appealed the decisions of the district court.

II.

STANDARD OF REVIEW

[1] This court reviews the grant of summary judgment motions *de novo*, using the same criteria used by the district court in the first instance. *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir.1988). We "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving parties." *Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc.*, 804 F.2d 879, 881 (5th Cir.1986) (per curiam) (citing *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 873 (5th Cir.1984)). Summary judgment is proper "if the pleadings, depositions, answers to

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[2] The district judge granted Southern's motion to dismiss/motion for summary judgment in the alternative. Because the district judge indicated in his opinion that he reviewed evidence in addition to the pleadings, we think the motion should be treated as one for summary judgment.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

III.

STATUS: SEAMAN OR LONGSHOREMAN

Yet again, this court must decide whether a maritime worker is entitled to compensation benefits or negligence remedies or both; and, if so, which benefits and remedies. Easley claims that he is a seaman entitled to the remedies provided by the Jones Act. In the alternative, he claims that he is a longshoreman entitled both to compensation benefits and to negligence remedies afforded by the LHWCA. Finally, he claims that he is entitled to an action for unseaworthiness under the general maritime law.

The LHWCA applies to any "employee' whose "disability or death results from an injury occurring upon the navigable waters of the United States." 33 U.S.C. § 903. To come within the coverage of the Act, a worker must meet both a "status" and a "situs" requirement. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985). Situs is not at issue here as Easley was indisputably injured while serving on a vessel which was located in the Mississippi River at the time of the occurrence.

[2,3] The "status" test, on the other hand, is crucial to the results of this case. That test seeks to determine if the nature of the employee's work and duties bring him within the ambit of the LHWCA. The LHWCA defines

"employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operation, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker." § 2(3). It explicitly excludes from this definition, and therefore from coverage under the LHWCA, "a master or member of a crew of any vessel." *Id.* "Member of the crew" is virtually synonymous with "seaman". *See White v. Valley Line Co.*, 736 F.2d 304, 305 (5th Cir.1984). Therefore, anyone who is a "seaman" for Jones Act purposes is a "member of the crew" under the LHWCA, and thus excluded from its coverage.

[4] This court has repeatedly determined that the Jones Act and the LHWCA are mutually exclusive. *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 983 (5th Cir.), *reh. denied* 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988). A worker cannot be both a seaman for Jones Act purposes and a longshoreman under the LHWCA. *McDermott Int'l, Inc. v. Wilander*, ___ U.S. ___, 111 S.Ct. 807, 813, 112 L.Ed.2d 866 (1991).

In the past, this court sought an appropriate framework in which to determine whether a worker is a seaman or a longshoreman. In 1987, with *Pizzitolo,* we resolved the question and settled on an workable analysis: "Although we have on occasion analyzed the question of whether an employee engaged in longshoring or ship repairing was a member of the crew of a vessel ... we are persuaded that such an analysis is unnecessary if the employee is engaged in an occupation expressly enumerated in the [LHWCA]". *Id.* at 983 (footnote omitted).[3] After *Pizzitolo,*

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[3] This court re-examined this framework in *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291 (5th Cir.1987). We re-confirmed our *Pizzitolo* holding, but indicated that a seaman-status analysis is still appropriate when considering occupations other than those enumerated in

when defining the status of a maritime worker as either a seaman or longshoreman, we first determine whether the worker is "engaged in an occupation expressly enumerated" by the LHWCA in § 2(3). If he belongs to an enumerated class of workers, he is covered by the LHWCA, so we will normally not inquire into his status as a seaman. *Id.*.

Nonetheless, our analysis does not end there, Section 5(b) provides that a worker covered by the LHWCA may also sue a vessel if his injury was caused by the vessel's negligence.[4] However, a person employed to provide shipbuilding, ship repairing, or shipbreaking services cannot proceed against his employer "in whole or in part or directly or indirectly" if the employer was "'the vessel's owner, owner pro hac vice, agent, operator, or charterer." § 5(b).

[5] Critical to our inquiry, then, is whether Easley is a shipbuilder or ship repairman. "If the employee's permanent duties, or his interim duties over an appreciable period of time, are such that he would be a covered ship repairer within the meaning of § 902(3) of the LHWCA, then he is barred from bringing suit against his employer under

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Footnote 3 continued.

§ 2(3). *Leonard*, 828 F.2d at 296. The following year we decided *Legros v. Panther Services Group, Inc.*, 863 F.2d 345 (5th Cir.1988), in which we modified the *Pizzitolo* framework to again include a seaman-status analysis under appropriate circumstances. The *Legros* decision, however, was vacated when we granted suggestion of rehearing *en banc*. *Legros*, 863 F.2d at 355. The appeal was later dismissed on motion of one of the parties. *See Legros v. Panther Services Group, Inc.* 874 F.2d 953 (5th Cir.1989). Because the original *Legros* opinion was vacated, *Pizzitolo* remains the law of this circuit.

[4] If the vessel owner is the longshoreman's employer, the employee may sue only if the employer was negligent in his capacity as vessel owner. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530, 103 S.Ct. 254, 2547, 76 L.Ed.2d 768 (1983).

§ 905(b)." *Gay v. Barge 266*, 915 F.2d 1007, 1010 (5th Cir.1990). Because we conclude that Easley falls within that classification, our analysis need not proceed further. Although, as a shipbuilder or ship repairer, he is a longshoreman under the Act, he is excluded from the additional negligence remedies otherwise available under § 5(b).

True, § 2(3) expressly includes in its definition of "employee" the occupations of ship repairman, shipbuilder and shipbreaker; but, nowhere does it define or otherwise delineate the activities which constitute those occupations. "When making a determination of whether a claimant is 'engaged in an occupation expressly enumerated' in the LHWCA, the activity engaged in at the time of the injury should be considered along with the general employment activities." *Chauvin v. Sanford Offshore Salvage, Inc.*, 868 F.2d 735, 738 n. 22 (5th Cir.1989). *See also Thibodeaux v. Torch, Inc.*, 858 F.2d 1048 (5th Cir.), *reh. denied* 862 F.2d 874 (1988). According to his deposition and his time slips, Easley performed a number of duties in and around the Southern Shipbuilding yard. In just the month before his injury, he worked on locomotive cranes and yard equipment; performed on shore maintenance on a gantry, the dry dock, a work boat, and portable tools; worked in the compressor room; and performed other on shore maintenance chores. His time slips and his position indicate that these were his normal activities over the two and one half years that he worked as a mechanic for Southern. In addition, at the time of his injury Easley had been assigned to substitute as a deckhand on the NO. 6 for but a singe day, a type of duty he performed intermittently, at most, when one of the permanent crew members was unavailable.

[6] The plaintiff also argues that he is not a ship-

builder or ship repairman because he did not personally build or repair ships. It is not necessary that a worker, however, actually build or repair ships to be included within these classifications. He must only be directly involved in the shipbuilding or repair process. *Alabama Dry Dock and Shipbuilding Co. v. Kininess,* 554 F.2d 176 (5th Cir.), *cert. denied* 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977). In *Kininess* the plaintiff was injured while sandblasting rust from parts of an unassembled crane. Once assembled, the crane itself would be directly involved in the shipbuilding process. Because the injured worker's activity was a necessary prerequisite to the crane's use, the worker was found to be directly involved in the shipbuilding process. *Id.* at 178. *See also Alford v. American Bridge Div., United States Steel Corp.,* 642 F.2d 807, 812-13 (5th Cir.), *modified in part* 655 F.2d 86 (1981), *cert. denied* 455 U.S. 927, 102 S.Ct. 1292, 71 L.Ed.2d 472 (1982); *Ingalls Shipbuilding Corp. v. Morgan,* 551 F.2d 61, 62 (5th Cir.), *cert. denied* 434 U.S. 966, 98 S.Ct. 508, 54 L.Ed.2d 453 (1977).

The district court was correct in concluding that Easley was a ship repairman as a matter of law. As a mechanic who repaired and maintained equipment used in the shipbuilding and repair process he supported those who actually built and repaired ships. Clearly, Easley's duties directly furthered the shipbuilding or ship repair process. Therefore, he is a shipbuilder or repairer for purposes of the LHWCA.

Easley further argues that (1) he cannot be a shipbuilder or ship repairman because many of his principal duties were so far removed from the process that he could not possibly be considered directly involved, and (2) at the time of his injury, he was engaged as a deckhand on the NO. 6 and was therefore totally removed from the ship-

building /repair process. Both of these arguments fail. It is well settled in this circuit that the measure of longshoreman status is the character of the employee's work taken as a whole, not in piecemeal time increments or in distinct but temporary job assignments.[5] We examine not just the work in which he was engaged at the moment of his injury, but the entirety of his duties. *Gay v. Barge 266*, 915 F.2d 1007, 1010 (5th Cir.1990). Furthermore,

> [f]ocusing solely on the employee's activity at the time of injury might bar suits by a whole host of workers in other maritime occupations who are injured while temporarily performing repair work.... [T]o deny [the plaintiff] a cause of action in the morning but to grant him one in the afternoon is to make his rights under the ACT as random and indiscriminate as the sea herself.

Id. at 1010-11. *See also Burks v. American River Transp. Co.*, 679 F.2d 69 (5th Cir.1982).

This view is consistent with our approach in seaman-status cases under the Jones Act and "member of the crew" cases under the LHWCA. In those cases we look to

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[5] Only when his permanent job assignment has changed during the course of his employment is a worker entitled to have the substantiality of his vessel-related work evaluated for a period less than the total time employed by his current employer. *Lormand v. Superior Oil Co.*, 845 F.2d 536, 540 (5th Cir.1987). Easley presented no evidence that his permanent job assignment changed from mechanic to deckhand. He argued instead that he had two distinct and separate jobs at Southern—mechanic and "regular substitute deckhand." However, Easley presented no evidence that his job classification changed, that he was paid separately, or that he was distinguished in any other way when he was intermittently assigned to work aboard the NO. 6. In fact, the record indicates that his deckhand time was accounted for in the same way as was the time when he was performing his other duties, and that he was paid his standard wage regardless of the type of work he performed during the pay period.

the context of the work performed aboard vessels within the larger sphere of the worker's assignment with his employer. *See Lormand v. Superior Oil Co.*, 845 F.2d 536, 540 (th Cir.1987), *cert. denied* 484 U.S. 1031, 108 S.Ct. 739, 98 L.Ed.2d 774 (1988); *Barrett v. Chevron, U.S.A.*, 781 F.2d 1067, 1076 (5th Cir.1986).[6] If we were to analyze Easley's assignment with respect to seaman status instead of longshoreman status, we would be forced to the same conclusion even accepting the plaintiff's argument that he was a "regular" substitute deckhand. Easley's sporadic and intermittent assignments to Southern's vessels simply were not substantial in the context of his employment.[7] Moreover, with the exception of his occasional deckhand assignments, we see nothing in the record that would distinguish any of his activities as clearly non-ship repair under the standards set forth in *Kininess* and the cases cited above.

Easley's position is similar to that of the plaintiff in *Chauvin v. Sanford Offshore Salvage, Inc.*, 868 F.2d 735 (5th Cir.1989). Chauvin normally worked in his employer's salvage yard and assisted in the repair of his employer's salvage barge. When the barge performed offshore salvage work, Chauvin was assigned to it. 868 F.2d at 736. In the two months prior to his injury, he had spent only two days doing seaman's work. *Id.* at 739. At the time of his accident, Chauvin was helping transport equipment to another salvage barge. *Id.* at 736-37. Even though the court found

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[6] A seaman does not lose his status as a seaman simply because he is temporarily assigned to shore duty. *Smith v. Odom Offshore Surveys, Inc.*, 791 F.2d 411 (5th Cir.1986). Likewise, a longshoreman does not lose his status as a longshoreman simply because he was assigned deckhand duties intermittenly.

[7] Even had Easley performed a substantial portion of his work aboard vessels, he cannot be a seaman because, we find, he is a member of an enumerated classification under the LHWCA. *See Pizzitolo*, 812 F.2d 977 (5th Cir.1987).

that Chauvin was engaged in longshoring duties at the time of his injury, the court reasoned that " :if we were to utilize the test of Chauvin's activity against his general employment background, he would fall within one of the LHWCA enumerated occupations.' .... Chauvin's activities at the time of his injury as well as his general employment require him to be classified as a longshoreman within the meaning of the LHWCA." *Id.* at 739 (quoting the district court's opinion).

We find that because a substantial amount of his work contributed to the shipbuilding/repair process. Easley was a shipbuilder or ship repairman. As a member of an occupation enumerated in § 2(3), Easley is a covered worker but is limited to those compensation remedies to which all covered workers are entitled under the LHWCA. As a shipbuilder or ship repairman, he may not maintain an action for negligence against his employer or the vessel.

IV.

GENERAL MARITIME LAW CLAIM

[7] In 1972 Congress enacted § 5(b) of the LHWCA which overruled the Supreme Court's holding in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). *Sieracki* allowed longshoremen a cause of action for unseaworthiness against a vessel owner. Section 5(b) expressly eliminated the unseaworthiness action for all employees covered by the LHWCA. *McDermott Int'l, Inc. v. Wilander*, ____ U.S. ____, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991). Because Easley is a covered employee under the LHWCA, he is not entitled to any remedies stemming from the warranty of seaworthiness. His remedies will only be found within the four corners of the LHWCA.

V.

CONCLUSION

Easley's duties and recent work record clearly show that he was directly involved with the shipbuilding or ship repair process. As a shipbuilder/ship repairman, Easley is a member of a class of workers specifically enumerated as falling within the ambit of the LHWCA. As a longshoreman he may not bring an action for unseaworthiness under the general maritime law or for negligence under the Jones Act. Furthermore, as a shipbuilder/ship repairman, Easley is prohibited from bringing an action for negligence against the vessel or his employer as shipowner under LHWCA § 5(b). So, because he is a shipbuilder or ship repairman, Easley's recovery under the LHWCA is limited to compensation benefits to the extent he is eligible for them.

AFFIRMED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3021

FILED
AUG 26 1991

STEVEN L. EASLEY,

Plaintiff-Appellant,

versus

SOUTHERN SHIPBUILDING CORP.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 07/30/91, 5 Cir., 198__, ____F.2d____)

(August 26, 1991)

Before JOHNSON, SMITH and WIENER, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

s/s Illegible

UNITED STATES CIRCUIT JUDGE

APPENDIX F

VERBATIM TEXT OF 33 U.S.C.A. 902

"Definitions:

When used in this chapter: (3) The term 'employee' means any person means any person engaged in Maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, a ship builder, and ship breaker, but such term does not include - (g) a master or member of a crew of an vessel."

APPENDIX G

VERBATIM TEXT OF 33 U.S.C.A. 905(b)

NEGLIGENCE OF VESSEL:

> In the event of injury of a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide ship building, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

APPENDIX H

VERBATIM TEXT OF 46 U.S.C.A. 688

"Recovery for injury to or death of seaman (a) application of railway employee statutes; jurisdiction.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such action shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

FILED
FEB 21 1992
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No. 91-885

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

STEVEN L. EASLEY,
Petitioner

v.

SOUTHERN SHIPBUILDING CORPORATION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

ROBERT H. MURPHY *
KENNETH J. SERVAY
DOUGLAS L. GRUNDMEYER
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Attorneys for Respondent, Southern Shipbuilding Corporation

* Counsel of Record

February 21, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

Respondent, Southern Shipbuilding Corporation, disagrees with Petitioner's statement of the questions presented for review. The questions presented for consideration are:

1. Whether the United States Court of Appeals for the Fifth Circuit and the district court correctly applied the proper legal standards for determining seaman status under the Jones Act, 46 U.S.C. § 688, consistent with this Court's recent opinions in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. ——, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991), and *McDermott Int'l, Inc. v. Wilander*, 498 U.S. ——, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991)?

2. Whether summary judgment dismissing Petitioner's Jones Act and general maritime law claims was appropriate, where no genuine issue of material fact existed and where the courts below applied the proper legal standards concerning Petitioner's job status?

LIST OF INTERESTED PERSONS AND RULE 29.1 CERTIFICATION

The parties to the proceeding below were Petitioner-Plaintiff, Steven L. Easley, Suzanne Easley (his wife), and Respondent-Defendant, Southern Shipbuilding Corporation.

Under this Court's Rule 29.1, Respondent, Southern Shipbuilding Corporation, certifies that it has no parent companies and no subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-885

STEVEN L. EASLEY,

Petitioner

v.

SOUTHERN SHIPBUILDING CORPORATION,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Southern Shipbuilding Corporation ("Southern"), submits that there is no basis for granting a writ of certiorari in this case. Recently, in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. ——, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991), and in *McDermott Int'l, Inc. v. Wilander*, 498 U.S. ——, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991), this Court clarified the tests for defining who is a "seaman" entitled to state a cause of action under the Jones Act, 46 U.S.C. App. § 688, and for granting summary judgment on seaman status. Consistently with *Gizoni* and *Wilander*, the courts below in this case applied the proper legal standards and correctly deter-

mined that no reasonable factfinder could conclude that Petitioner was a Jones Act seaman rather than a shipbuilder or ship repairer limited to compensation remedies under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901, *et seq.* The decisions of the court of appeals and the district court neither raise any unsettled issues warranting this Court's attention, nor conflict with any decision of this Court or any United States Court of Appeals. Petitioner has presented no compelling reason for granting certiorari to review a carefully reasoned summary judgment squarely within the controlling law.

STATEMENT OF THE CASE

Petitioner's statement of the course of proceedings and disposition below at pages 2-3 of his writ petition correctly recounts the procedural history of this case. However, Respondent restates the pertinent facts as follows:

A. The Undisputed Facts

The relevant facts, all of which are uncontested, are fully set forth in the decisions of the district court and the Fifth Circuit reproduced as appendices to Easley's writ petition. Southern Shipbuilding Corporation operates a shipyard in Slidell, Louisiana, where it repairs and constructs vessels, in addition to performing salvage operations. Petitioner Easley, a 20-year employee with Southern, worked as a "mechanic" in the shipyard. His duties included repairing cranes and shipyard equipment, as well as cutting grass, working in the compressor room, and maintaining Southern's drydock.

In earlier years, Easley had worked as a deckhand aboard Southern's vessels, but since 1987, at his own request, he was reassigned to the aforementioned duties as a land-based mechanic. However, at the time of his accident in this case, Easley was working on a one-day assignment as a temporary deckhand aboard one of his employer's vessels, the D/B SOUTHERN NO. 6. As

Easley concedes at pages 3-4 of his writ petition, of the total 159 hours he worked in the month before his accident, he spent only eight hours on a vessel, while spending the remaining 151 hours, or approximately 95% of his time, on land as a shipyard mechanic.

Although Easley styles himself as a "regular substitute deckhand," the undisputed facts established that he had been assigned to the vessel for only a single day at the time of his injury, that his deckhand duties were only sporadic and intermittent, and that he filled in only because permanent crewmembers were unavailable. Easley presented no evidence that his permanent job assignment as a land-based worker had changed in the two and one-half years since 1987, that he received anything other than a standard wage regardless of the type of work he performed, or that he accounted for his time any differently for his minimal and random vessel-related work.

B. The District Court Proceeding

As Easley notes at pages 2-3 of his petition for a writ of certiorari, he initially filed a negligence claim against Southern under the Jones Act. The district court granted Southern's motion for summary judgment, dismissing this claim on grounds that Easley was not a seaman. In its "Order and Reasons" entered on October 18, 1990 (*see* pages A-1 through A-3 of Easley's writ petition), the district court applied the two-part test for determining seaman status set forth in *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986):

> In order to prove that he is a seaman, entitled to compensation under the Jones Act, the plaintiff must show that: (1) he was permanently assigned to a vessel or performed a substantial part of his work on a vessel; and (2) the capacity in which plaintiff performed contributed to the function of the vessel, its mission, its operation, or its welfare.

Writ petition, page A-2. Citing *Gizoni v. Southwest Marine, Inc.*, 909 F.2d 385 (9th Cir. 1990), which this Court later affirmed, the district court specifically stated

that it would "look at the nature of the work actually done by the plaintiff and not his job titles" in deciding the motion for summary judgment. *Id.*

Applying this correct statement of law to the undisputed facts, the district court concluded that Easley's assignments to his employer's vessel were "intermittent and transitory," whereas "his permanent job assignment remained land-based." *See* writ petition, page A-3. Even accepting plaintiff's assertion that he had worked 11.5% of his time on a vessel, the court found that this temporary vessel assignment was not a regular and continuous change in his normal function as a machinist in the shipyard. *Id.* Thus, even when viewed in a light most favorable to the plaintiff, the evidence could not reasonably lead to a conclusion that Easley was a seaman.

After the district court dismissed his Jones Act claim, Easley moved to amend his complaint to allege a claim in negligence under 33 U.S.C. § 905(b) and the general maritime law. Southern moved to dismiss this claim on grounds that Easley's sole remedy against his employer and its vessel was compensation under the LHWCA. Viewing the undisputed evidence again in the light most favorable to the plaintiff, the district court concluded that Easley's job of repairing cranes, working in the compressor room, and maintaining the drydock supported his employer's shipbuilding and ship repair business. Because Easley was thereby directly involved in shipbuilding and ship repair work, the court found him to be a shipbuilder or ship repairer barred by the express provisions of 33 U.S.C. § 905(b) from suing his employer or its vessel for damages under § 950(b) or the general maritime law. *See* district court's "Order and Reasons" entered on December 11, 1990 (reproduced at pages A-4 through A-6 of Petitioner's writ application).

C. The Fifth Circuit's Opinion

On July 30, 1991, the United States Court of Appeals for the Fifth Circuit affirmed the district court's rulings.

Easley v. Southern Shipbuilding Corp., 936 F.2d 839 (5th Cir.), *rehearing denied, en banc*, 943 F.2d 1315 (5th Cir. 1991), reproduced at pages A-8 through A-20 of plaintiff's writ petition. Citing this Court's decision in *Wilander*, the Fifth Circuit recognized that a maritime worker "cannot be both a seaman for Jones Act purposes and a longshoreman under the LHWCA." 936 F.2d at 842; writ petition, page A-13. The court of appeals then proceeded to analyze the undisputed facts and concluded that the district court had correctly found that Easley was a ship repairman covered by the LHWCA rather than a Jones Act seaman. The Fifth Circuit did not simply analyze Easley's job assignment in light of his LHWCA job status, but alternatively looked to seaman-status cases under the Jones Act, as well as "member of the crew" cases under the LHWCA in reaching its decision:

> If we were to analyze Easley's assignment with respect to seaman status instead of longshoreman status, we would be forced to the same conclusion even accepting the plaintiff's argument that he was a "regular" substitute deckhand. Easley's sporadic and intermittent assignments to Southern's vessels simply were not substantial in the context of his employment. Moreover, with the exception of his occasional deckhand assignments, we see nothing in the record that would distinguish any of his activities as clearly non-ship repair. . . .

936 F.2d at 844-845; writ petition, page A-18. The Fifth Circuit therefore affirmed the summary judgment, concluding that Easley was not a Jones Act seaman. Furthermore, as an LHWCA-covered worker directly involved in the shipbuilding or repair process, he could not maintain an action for negligence or unseaworthiness under the general maritime law against his employer or its vessel. 936 F.2d at 845; writ petition, page A-19.

REASONS FOR DENYING THE WRIT

I. THE DECISIONS OF THE FIFTH CIRCUIT AND THE DISTRICT COURT ARE CONSISTENT WITH THIS COURT'S RECENT *GIZONI* AND *WILANDER* DECISIONS ON SEAMAN STATUS

In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. ——, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991), this Court held that a maritime worker engaged in an occupation enumerated in the LHWCA may nonetheless be a "seaman" within the meaning of the Jones Act, depending upon the nature of the work rather than the worker's job title. This Court further held that a district court cannot deny seaman status as a matter of law solely because the claimant's job title or occupation falls within one of the enumerated occupations defining an employee under the LHWCA. Nonetheless, this Court also recognized in *Gizoni* that summary judgment limiting a worker to LHWCA remedies is appropriate, if no genuine issue of material fact exists as to whether the worker is a seaman under the Jones Act. 112 S.Ct. at 492.

This Court also recently clarified the test for determining whether a party is a seaman. In *McDermott Int'l, Inc. v. Wilander*, 498 U.S. ——, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991), this Court acknowledged the Fifth Circuit's long-standing, two-part analysis for seaman status in *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959), the same test set forth in *Barrett v. Chevron U.S.A., Inc.*, cited above, which the courts below applied in this case. 111 S.Ct. 809-810, 817. Under that test, a party is considered a seaman if only (1) the party is permanently attached to or performs a substantial part of his or her work aboard a single vessel or an identifiable fleet of vessels and (2) if the party's employment contributes to the function or mission of the vessel or an identifiable fleet of vessels. In *Wilander*, this Court recognized these guidelines in determining seaman status. *Id.*

This Court further recognized in *Wilander* that the purpose of the LHWCA is to remove land-based maritime workers from the scope of Jones Act coverage, while leaving sea-based maritime employees as seamen under the Jones Act. 111 S.Ct. at 813-14. In other words, the phrase "master or member of a crew" as used in the LHWCA exemption from coverage "restates who a 'seaman' under the Jones Act is supposed to be: a sea-based maritime employee." 111 S.Ct. at 814. As it had done earlier in *Norton v. Warner Co.*, 321 U.S. 565 (1944), this Court in *Wilander* again quoted with approval the following language concerning seaman status from the Fifth Circuit's opinion in *Maryland Casualty Co. v. Lawson*, 94 F.2d 190, 192 (5th Cir. 1938): "There is implied a definite and *permanent* connection with a vessel, an obligation to forward her enterprise." 111 S.Ct. 817 (emphasis added). This Court ultimately held in *Wilander*, "Whether under the Jones Act or general maritime law, seamen do not include land-based workers." 111 S.Ct. at 814.

Petitioner misstates the first question presented for review by improperly asserting that the trial court dismissed his Jones Act claim after finding that he was "an employee in an occupation specifically covered by the LHWCA." By framing his question in that fashion, Petitioner would have this Court believe that the district court and the Fifth Circuit's decisions are directly contrary to *Gizoni*. No such conflict exists.

As noted earlier, in its Order and Reasons entered on October 18, 1990 (*see* pages A-1 through A-3 of Petitioner's writ application), the district court cited the Ninth Circuit's decision in *Gizoni* and expressly stated that it "prefers to look at the nature of the work actually done by the plaintiff and *not his job titles.*" Writ petition, page A-2 (emphasis added). The district court then applied the two-part *Barrett/Robison* test for Jones Act seaman status to determine if it could be reasonably found (1) that plaintiff was permanently assigned to a

vessel or performed a substantial part of his work on a vessel and (2) that his capacity contributed to the function of the vessel, its mission, its operation, or its welfare. Writ petition, pages A-2 and A-3.

The district court's approach was entirely consistent with *Gizoni* and *Wilander*. Based on undisputed facts, the court correctly determined that plaintiff's random, brief, intermittent, and transitory assignment as a substitute deckhand did not constitute a permanent assignment to a vessel or a substantial part of his work. Writ petition, page A-3. It was only later—after it had correctly analyzed the seaman status issue and dismissed the Jones Act claim and after Easley had moved to amend his complaint to assert a vessel negligence action under 33 U.S.C. § 905(b) of the LHWCA or, alternatively, a general maritime law claim as an employee allegedly not covered by the LHWCA—that the district court determined that he was a ship repairer or shipbuilder limited exclusively to LHWCA compensation remedies against his employer. *See* district court's Order and Reasons entered on December 11, 1990 (reproduced at pages A-4 through A-6 of Petitioner's writ application).

In affirming the district court, the Fifth Circuit did rely in part on its decision in *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988), holding that Easley, as "a member of an enumerated classification under the LHWCA," could not be a seaman. 936 F.2d at 845, n.7; writ petition, page A-18. In *Gizoni*, this Court effectively overruled *Pizzitolo*. Nonetheless, the Fifth Circuit's reliance on *Pizzitolo* provides no basis for granting a writ in this case. The appellate court did not deny Easley seaman status solely because he was a shipbuilder or ship repairman. The Fifth Circuit also employed the same seaman status analysis as the district court. Citing this Court's decision in *Wilander*, the Fifth Circuit noted that a worker cannot be both a seaman for Jones Act purposes and a longshoreman under the LHWCA. 936 F.2d 842;

writ petition, page A-13. The appellate court specifically analyzed Easley's work "with respect to seaman status" and reached the same conclusion as the district court, holding that Easley's sporadic and intermittent assignment as a deckhand was not substantial enough in the context of his entire employment to qualify him for seaman status under the established two-part test. 936 F.2d at 844-845; writ petition, pages A-17 and A-18.

Because the Fifth Circuit alternatively analyzed Easley's seaman status without regard to his job title, as required by *Gizoni*, and concluded that Easley was neither permanently assigned to a vessel nor performed a substantial part of his work aboard a vessel as required for Jones Act seaman status, its partial reliance on *Pizzitolo* is ultimately inconsequential. There is no need to grant certiorari, vacate the judgment, and remand this case to the Fifth Circuit for reconsideration in light of *Gizoni*. The district and appellate courts have already fully satisfied the mandate of this Court's recent holding.[1]

The courts below applied the proper legal test for seaman status, and their judgments do not conflict with any decision of this Court or any other circuit. This case simply presents no compelling or unanswered issue of law for this Court to resolve. This Court has already

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[1] Respondent is aware of this Court's recent disposition on January 13, 1992 in Nos. 90-722 and 90-596, *Campo v. Electro-Coal Transfer Corp.* and *Natl. Union Fire Ins. Co. v. Campo*, 60 U.S.L.W. 3477, vacating a judgment of the Fifth Circuit and remanding that case to the court of appeals for further consideration in light of *Gizoni*. However, the Fifth Circuit in *Campo* relied solely on *Pizzitolo* to deny seaman status to a plaintiff because he was engaged in an occupation expressly enumerated in the LHWCA. *Campo v. Electro-Coal Transfer Corp.*, 1991 A.M.C. 2657, 2658-2659 (5th Cir. 1990); slip opinion No. 89-3738 (April 23, 1990) at pp. 3-4. Here, unlike *Campo*, the Fifth Circuit, in addition to citing *Pizzitolo*, applied a seaman status analysis consistent with *Gizoni* and *Wilander*. 936 F.2d at 844-845; writ petition, pages A-17 and A-18. Thus, *Campo* is readily distinguishable and does not support a similar writ grant and remand in this case.

provided all the guidance necessary to decide this case, and the courts below have analyzed the undisputed facts and reached a result consistent with controlling Supreme Court jurisprudence. Petitioner has presented no basis for granting a writ in this case.

II. THIS COURT SHOULD REFUSE TO REVIEW A PROPER SUMMARY JUDGMENT

In his second and third questions presented for review, Petitioner is essentially asking this Court to overturn a proper summary judgment of dismissal, even though he can point to no error of law or any genuine issue of material fact that would warrant a trial on the merits. Four judges in the courts below, after examining the undisputed facts and correctly applying controlling legal standards, have already determined that no reasonable factfinder could conclude that plaintiff Easley was a Jones Act seaman.

Petitioner acknowledges that the two-part test for seaman status requires that the worker be *permanently* assigned to a vessel or perform a *substantial* part of his work on it. *See* writ petition, page 8. In this case, Petitioner clearly failed to meet either requirement. Easley admits that he was never "permanently" assigned to his employer's vessels, but only worked on them temporarily. His work aboard the D/B SOUTHERN NO. 6 was for only one day. *See* writ petition, page 6. To satisfy the requirement of "substantial work," the claimant must prove a relationship to a vessel "that is substantial in point and time and not merely spasmodic." *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1979). Easley's work aboard vessels was most certainly not substantial in this case, where he spent approximately 90-95% of his working hours in land-based duties. Furthermore, his vessel-related work was random and fortuitous, whereas his land-based activities constituted his permanent job assignment and virtually the entirety of his employment.

Easley further concedes that summary judgment is proper where the facts establish the lack of seaman status as a matter of law and where the record contains no reasonable evidentiary basis to support a finding otherwise. *See* writ petition, page 8. His petition for a writ of certiorari presents no compelling reason for this Court to review a proper decision entered in accordance with the recognized test for seaman status and this Court's landmark decisions on summary judgment. The undisputed facts of this case present no issue warranting this Court's attention.

In *Wilander* and *Gizoni*, this Court held that the question of who is a "member of the crew" or "seaman" is "a mixed question of law and fact." *Wilander*, 111 S.Ct. 818; *Gizoni*, 112 S.Ct. 491-492. Although this question of seaman status is necessarily fact-specific, this Court has recognized that "summary judgment or directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Wilander*, 111 S.Ct. at 818, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 251 (1986). When the underlying facts are established, and the rule of law is undisputed, the issue is whether the facts meet the statutory standard. *Wilander*, 111 S.Ct. at 818, citing *Pullman-Standard v. Swint*, 456 U.S. 273, 289, n.19 (1982). If no genuine issue of material fact exists as to whether the worker was a seaman under the Jones Act, then a maritime worker employed by a shipyard is limited to LHWCA remedies. *Gizoni*, 112 S.Ct. at 492.

In *Gizoni*, this Court held that a ship repairman who spends "*all* of his working hours aboard a vessel—even one used exclusively in ship repair work" nonetheless "may qualify as a Jones Act seaman." 112 S. Ct. at 494 (emphasis added). In *Gizoni*, questions of fact existed whether a floating platform used by a rigging foreman in his *regular* work at a shipyard was a vessel in navigation and whether the worker had a sufficient connection to the

platform to qualify for seaman status. Under those circumstances, the question of seaman status was one for the jury, where reasonable persons, applying the proper legal standard, could differ as to whether that employee was a member of the crew. Unlike *Gizoni*, this case presents no issue for the factfinder. The undisputed evidence in this case established that Easley was a land-based shipyard worker who only intermittently worked as a substitute deckhand aboard his employer's vessels. Thus, *Gizoni* does not require this Court to grant writs to review the summary judgment in this case.

Applying this Court's mandate for deciding summary judgment motions enunciated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), both the district court and the Fifth Circuit accepted as true plaintiff's assertions that he worked only 11.5% of his time on the vessel, and necessarily found that his assignment to the vessel was "intermittent and transitory while his permanent job assignment remained land-based." *See* page A-3 of Petitioner's writ application. Thus, "even accepting the plaintiff's argument that he was a 'regular' substitute deckhand," plaintiff's "sporadic and intermittent assignments to Southern's vessels were simply not substantial in the context of his employment." *Easley*, 936 F.2d 844-845; writ petition, page A-18. Under these circumstances, summary judgment was not only consistent with this Court's jurisprudence, but was mandated by it. *See Celotex*, cited above; *see also Anderson v. Liberty Lobby, Inc.*, *cited above; Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).[2]

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[2] Summary judgment dismissing Easley's Jones Act claim was likewise consistent with a long line of prior decisions in several circuits denying seaman status to shore-based workers with only intermittent relationships to vessels. *See Griffith v. Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 31 (3rd Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976), holding that a land-based laborer's temporary assignment to work with a barge crew for only three and three-

By arguing that he was working as a "regular substitute deckhand" at the time of his accident, Easley seeks to create a factual question of seaman status from a job title alone, rather than the totality of actual work he performed. In *Gizoni*, this Court expressly rejected that approach. *Gizoni* teaches that the proper inquiry is whether the nature of the claimant's work makes him a sea-based employee instead of a land-based worker. Easley's attempt to label himself as a "deckhand" ignores the reality of his permanent land-based job as a mechanic and raises, at best, nothing more than a "metaphysical

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quarter days of his 74 days of employment did not satisfy the requirement of a permanent connection to a vessel and, as a matter of law, did not give rise to seaman status; *Whittington v. Sewer Construction Co., Inc.*, 541 F.2d 427 (4th Cir. 1976), holding that a shore-based worker who had incidental and intermittent duties aboard a barge moored to a bridge was not a seaman; *Lormand v. Superior Oil Co.*, 845 F.2d 536 (5th Cir. 1987), *cert. denied*, 484 U.S. 1031 (1988), granting summary judgment denying seaman status to a welder who performed only 14 percent of his work activity aboard vessels; *Stokes v. B.T. Oilfield Services, Inc.*, 617 F.2d 1205 (5th Cir. 1980), granting summary judgment denying seaman status to a land-based roustabout who lacked permanent attachment to a vessel, where in his 28 work days before his accident aboard a barge, he had spent 27 days in land-based employment and only one day at sea; *Fazio v. Lykes Brothers S.S. Co., Inc.*, 567 F.2d 301 (5th Cir. 1978), granting summary judgment denying seaman status to a shore gang worker who performed no permanent duties aboard vessels, though from time to time he did perform transitory vessel repair jobs; *Labit v. Carey Salt Co.*, 421 F.2d 1333 (5th Cir. 1970), granting summary judgment denying the Jones Act claim of a shore-based worker who loaded vessels with bulk salt and who only occasionally and sporadically operated a power boat to position the vessels for loading; *Miller v. Patton-Tully Transportation Co.*, 851 F.2d 202 (8th Cir. 1988), denying seaman status to a bulldozer operator who spent only one-third of his time on water, which was not "substantial" enough a part of his work to qualify him as a seaman; *Bullis v. Twentieth-Century Fox Film Corp.*, 474 F.2d 392 (9th Cir. 1973), granting summary judgment denying seaman status to off-duty servicemen acting as temporary or transitory extras on a vessel during filming of a motion picture.

doubt" insufficient to create a genuine issue of material fact. *See Matsushita*, 475 U.S. at 586.

The undisputed facts in this case, even when viewed in a light most favorable to the plaintiff, establish that Easley was a land-based shipyard mechanic who neither had any *permanent* attachment to a vessel nor performed a *substantial* part of his work on a vessel. Accordingly, he failed to carry his burden of proving seaman status. Consistent with this Court's jurisprudence, the district court properly granted summary judgment dismissing his Jones Act claims, and the Fifth Circuit correctly affirmed the district court's decision. Under these circumstances, Petitioner presents no valid reason for granting certiorari in this case.

At pages 10-13 of his writ petition, Easley further argues that he may maintain a claim under the general maritime law against his employer even if he is not found to be a Jones Act seaman. He contends that he spent some of his time "doing substitute seaman's work," but asserts that he spent no time whatsoever doing "longshoring, shipbuilding, ship repairing, or ship breaking" that would make him an LHWCA employee limited to a compensation remedy against his employer. These arguments are meritless, because the undisputed facts show that Easley was directly involved in shipbuilding and ship repair work.

In his work as a mechanic for Southern, Easley admittedly spent at least 90% of his time repairing his employer's cranes, working in the compressor room, maintaining a drydock, and performing other duties in the shipyard. These activities directly involved him in the work of shipbuilding and ship repairing, even though he may not have personally built or repaired ships himself. The cranes, equipment, and drydock that he maintained and repaired were used in his employer's work of shipbuilding and ship repairing, and he furthered his employer's mission through his land-based job.

In *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977), cited by both courts below, a worker was injured while sandblasting an unassembled crane in a shipyard. He was a "shipbuilder" covered by the LHWCA, because his activity was a necessary prerequisite for use of the crane and because the assembled crane would be directly involved in the shipbuilding process. *Accord*, *Graziano v. General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981); *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672 (2d Cir.); *cert. denied*, 454 U.S. 836 (1981); *White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070 (4th Cir. 1980); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085 (11th Cir. 1988). Easley's duties in maintaining his employer's equipment, including cranes and a drydock, dictate the same result in this case. The courts below therefore correctly held that he was an employee covered by the LHWCA. Again, Petitioner presents no compelling reason for this Court to review a well-reasoned summary judgment fully warranted by the facts and the controlling law.

CONCLUSION

The decisions of the district court and the Fifth Circuit are consistent with this Court's requirements for seaman status and summary judgment set forth in *Gizoni*, *Wilander*, and other established Supreme Court jurisprudence. Easley's writ application presents no meritorious reasons for granting certiorari. The Fifth Circuit's decision does not conflict with any decision of this Court or of any other United States Court of Appeals on the matters presented in this case. Nor does this case present any unsettled or important question of law that this Court has not already decided. For the reasons discussed above, Respondent, Southern Shipbuilding Corporation, respectfully submits that this Court should deny Petitioner's request for a writ of certiorari.

Respectfully submitted,

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